

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY S. CURRY,

Defendant-Appellant.

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UNPUBLISHED

February 6, 1998

No. 197672

Recorder's Court

LC No. 96-001039

Before: Michael J. Kelly, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for two counts armed robbery, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced as a habitual offender, MCL 769.13; MSA 28.1085, to seven years six months to fifteen years for each of the armed robbery convictions and two years for each of the felony-firearm convictions. We affirm.

Defendant's first issue on appeal is that the verdict was against the great weight of the evidence and was not supported by sufficient evidence. An objection going to the weight of the evidence can only be raised by a motion for a new trial before the trial court. *People v Bradshaw*, 165 Mich App 562, 565; 419 NW2d 33 (1988). Failure to raise the issue by the appropriate motion waives the issue on appeal. *People v Johnson*, 168 Mich App 581, 585; 425 NW2d 187 (1988). Defendant failed to raise this issue before the trial court and, therefore, has waived review of this issue. *Id.*

In reviewing a claim of insufficient evidence this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the essential elements of the crime were prove beyond a reasonable doubt. *People v Hunter*, 209 Mich App 280, 282; 530 NW2d 174 (1995). Reasonable inferences and circumstantial evidence may constitute satisfactory proof of the elements of the offense. *Id.*

The prosecution presented sufficient evidence to support defendant's convictions. The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's person or presence, and (3) the defendant must be armed with a weapon. *People v Johnson*, 215 Mich App 658, 671; 547 NW2d 65 (1996). The elements of felony-firearm require that defendant possessed a

firearm during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

First, there was evidence that defendant grabbed a witness, showed her a gun, took her into a separate room and demanded that she open a safe. As the witness was attempting to open a separate area of the safe, defendant took approximately \$200 in petty cash. This witness identified defendant as one of the two men who entered the premises with guns and the one that grabbed her. A second witness also identified defendant as one of the two men that entered the premises with guns, and while defendant led the first witness into the room with the safe, the other man kept his gun pointed at the second witness, went through her purse, and took her car phone and approximately \$170. Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could find defendant guilty beyond a reasonable doubt of two counts of armed robbery and two counts of felony-firearm.

Defendant's second issue on appeal is that his trial attorney failed to provide him with effective assistance of counsel. We disagree. Our review is limited to errors by counsel evident in the existing trial record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency was prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The defendant must overcome the presumption that the challenged action is sound trial strategy. *Id.*

Defendant first claims that his trial attorney failed to provide effective assistance by failing to move to suppress an unduly suggestive pretrial lineup. We disagree. Defendant claims that his pretrial identification was inadmissible because the people in the lineup were of disparate age, height and weight. Discrepancies as to physical characteristic among lineup participants do not necessarily render the procedure defective provided that the participants approximate the culprit's description. *People v Kurylcz*, 443 Mich 289, 312; 505 NW2d 528 (1993). The lineup consisted of six participants all of the same race and sex as defendant, and the officer conducting the lineup testified that the people participating in the lineup were similar in physical description. Thus, the lineup was not unduly suggestive. Where a lineup is not suggestive, counsel's failure to object is not ineffective assistance of counsel. *People v Currelley*, 99 Mich App 561, 568; 297 NW2d 924 (1980).

Defendant next claims that trial counsel was ineffective for failing to challenge whether a witness had an independent basis for her in-court identification of defendant. Where the lineup identification is admissible, the trial court is not obligated to determine whether an independent basis exists for the in court identification unless the defendant asserts that the pretrial identification was tainted by improper procedure or unduly suggestive comments, which defendant, in this case, has not alleged. *People v Laidlaw*, 169 Mich App 84, 92-93; 425 NW2d 738 (1988). As discussed above, the lineup identification was admissible and, therefore, trial counsel was not ineffective for failing to challenge whether the witness had an independent basis for her in-court identification of defendant.

Defendant also claims that trial counsel failed to investigate and present an alibi defense. We disagree. Defendant filed a notice of intent to present an alibi defense which listed three names, including Elaine Gardner. Gardner testified on behalf of defendant that, although she does not remember the particular day in question, it was defendant's practice to walk her home after work and

she did not remember any evening around the time of the robbery that defendant did not walk her home from work. Considering Gardner's work schedule and the distance to her home, it would not have been possible for defendant to walk her home on the night of the robbery and commit the robbery at the same time. Thus, trial counsel did present an alibi defense. The record is silent as to what any of the other alibi witnesses defendant listed would have testified to and review of this issue is limited to the record. Defendant's mere allegation as to what his other alibi witnesses should have testified to is insufficient to establish that trial counsel was ineffective.

Defendant's third issue on appeal is that the admission of defendant's former aliases was prejudicial and without probative value. We disagree. This Court reviews whether evidence was properly admitted for an abuse of discretion. *People v Crump*, 216 Mich App 210, 211; 549 NW2d 36 (1996). The prosecution only introduced evidence that defendant had, at one time, spelled his name differently than the current spelling after defendant opened the door regarding his name being spelled differently than that of another person also charged for the underlying offense. The prosecution responded to evidence and impressions raised by defendant during cross-examination, and the admission of the rebuttal evidence was within the trial court's discretion. *People v Figgures*, 451 Mich 390, 400; 547 NW2d 673 (1996).

Defendant's fourth issue on appeal is that the trial court refused a jury request to reread specific testimony. We disagree. This Court reviews decisions regarding the rereading of testimony for an abuse of discretion, and a trial court abuses that discretion when it denies a request to rehear testimony and forecloses the possibility that the jury's request will later be granted. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

The judge informed the jury that there would be a delay before the requested testimony could be reread to them and asked that they continue deliberations and rely on their collective recollections. However, the court informed the jury that it would be notified as soon as the information it requested was available. The jury returned a verdict prior to rehearing the requested testimony. The trial court did not foreclose the possibility of having the testimony reread to the jury, and therefore did not abuse its discretion.

Defendant's final issue on appeal is that the prosecution failed to file its intent to enhance defendant's sentence pursuant to the habitual offenders' statute within the statutory time after arraignment, and defendant did not receive notice of the prosecutor's intent to seek enhancement of defendant's sentence pursuant to the habitual offenders' statute until the day of sentencing. The prosecution filed a notice of intent to enhance defendant's sentence pursuant to the habitual offenders' statute on February 20, 1996, four days after defendant's arraignment. The same document indicated that defense counsel was served with the document by mail on March 7, 1996. Defendant's trial began on June 17, 1996. Thus, the prosecution complied with the statutory requirements of the habitual offenders' statute, MCL 769.13; MSA 28.1085.

Affirmed.

/s/ Michael J. Kelly  
/s/ Harold Hood  
/s/ Roman S. Gibbs